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# THE ‘IDEAL’ VICTIM OF INTERNATIONAL CRIMINAL LAW

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‘Two clichés make us laugh, a hundred clichés move us’

Umberto Eco<sup>1</sup>

## Abstract

The role of victims is increasingly central to discussions in and practices of international criminal law. Greater attention is, I argue, leading to a visual and discursive specification of victimhood. Drawing on criminologist Nils Christie’s theorizing of victimhood, and identifying practices inside and outside the international criminal law courtroom, I discuss the social, political, and legal construction of an ‘ideal’ victim. The features of an ‘ideal’ victim of international crime are identified as being: (a) weakness and vulnerability, (b) dependency and (c) grotesqueness. The features coalesce into a feminized, infantilized, and racialized stereotype of victimhood. I argue that this problematic construction of the ‘ideal’ victim is to be contextualized within the ‘attention economy’. The ‘attention economy’ views attention as a finite and highly in-demand resource which rewards the extreme and spectacular at the expense of the moderate and considered.

## Key words

international criminal law, ‘ideal’ victim, International Criminal Court, Nils Christie, attention economy

## 1. Introduction

Victims of conflict have in many ways been drivers of transitional justice. One need only consider the Aba Women’s Riots in British-ruled Nigeria in 1929 or the Madres de la Plaza de Mayo in Argentina. Whilst the Nigerian women’s protests were directed against the social,

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<sup>1</sup> Eco, “‘Casablanca’: Cult Movies and Intertextual Collage” 14(2) *SubStance* (1985) 3, at 11.

political, and economic inequalities of British colonial rule, the Madres de la Plaza de Mayo campaigned, and continue to campaign, against the disappearance of their children during the Argentine military dictatorship in the late 1970s and early 1980s. In international criminal law (ICL), however, such strong and resilient victims of conflict tend to be marginalized in favour of the mobilization, visual and textual, of a different type of victim altogether.

When visiting the International Criminal Court (ICC), one has the option of visiting an exhibition in the part of the entrance hall referred to as ‘The Business Centre’.<sup>2</sup> The multi-media exhibition includes video projections, photos, investigation and courtroom objects, and other installations to bring the work of the Court to life. With the help of a smartphone-type device, one is guided through the life of the ICC by a narrator. Curated by a company which promises on its website to attract the attention and convince the public of their client’s story,<sup>3</sup> it is a slick experience. One of the installations concerns victim-witness statements in the courtroom. The voice of the fictitious victim, speaking a slow heavily accented English, says the following about her experience:

I felt a very heavy responsibility, having to take part in a process of justice. I was a little afraid at the beginning of my testimony. And I felt vulnerable and faced a lot of emotions. My heart was beating very fast. But after a while I calmed down and I was fine. Now I know I have been heard. Morally I feel relieved. I do not know how to explain. It did not change anything physically, but morally it is one way for me to honour people who perished during the crisis. Testifying felt like letting go of something I had been holding on to. I felt free and very proud that I had done my work well. We would be forgotten without the Court. The Court is there so our voice is heard.

Let us consider the image-making employed in this fictitious soliloquy: Simple expressions and short sentences arguably relay associations of communicating with a child or at least

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<sup>2</sup> When I visited the exhibition on the first day it opened to the public in November 2016, I was directed towards the ‘Business Centre’; I have, however, found no official documents which designate this part of the ICC building as the ‘Business Centre’.

<sup>3</sup> <http://www.dpi.nl/over-ons/> (last visited 16 July 2018).

child-like intellect. The expression of emotions such as fear, vulnerability and pride seemingly enhance the female voice's 'femininity'. The fictitious victim-witness is, moreover, expressing dependency on the Court morally, legally, and emotionally. Expressions of dependency in combination with the foreign-accented speech evoke racialized associations.

In the following, I seek to demonstrate how this fictitious victim-witness conforms to similar infantilized, feminized, and racialized victim stereotypes produced and reproduced inside and outside the international criminal courtroom. I argue that the ICC and other proponents of ICL have been invoking victimhood not only as a means of self-legitimization in a self-referential vacuum, but in the context of competition in the attention economy. A condition of the neoliberal world in which we, at the very least in the Global North, live, is that our attention is constantly in demand. New technologies, an atomized sense of selfhood, and the commercialization of large parts of life, have led to time and attention being valuable and finite commodities. '[T]he game of harvesting human attention and reselling it to advertisers has become a major part of our economy.'<sup>4</sup> I argue that the operation of this attention economy is not only prevalent in the private sector; it is also applicable in what I call the 'global justice sector', shaping in particular the idea of an 'ideal' victim.

I begin in the following by examining the significant shifts which have occurred in relation to the status of the victim in international criminal law - from a marginalized entity to a central symbolic and political reference point. I then turn to the construction of the 'ideal' victim, identifying three attributes, namely weakness and vulnerability, dependency, and grotesqueness. This is followed by an argument setting out the institutionalization and fixing of ideal victimhood in and through the ICC. The final section places the political economy of 'ideal' victimhood in the foreground by emphasizing the demands of the 'attention economy'.

## **2. A Note on Methodology**

In his classic book *Orientalism*, Edward Said draws on an extensive catalogue of formal and literary writing, from speeches in the House of Commons to novels, to demonstrate how essentialism travels and is perpetuated. Stereotypes of the 'Oriental' as irrational, depraved, childlike are, according to Said, constructed through essentialism which is repeated, accepted

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<sup>4</sup> T. Wu, *The Attention Merchants: The Epic Scramble to Get Inside our Heads* (2016) 6.

and legitimized. Said argues that the Orient is best understood as a construction of the European Western imagination, as one of Europe's 'deepest and most recurring images of the Other.'<sup>5</sup> Much like Said's method of building an argument about orientalism from various cultural representations, this article takes a broad view on what is relevant to the construction of victimhood, from interview snippets, to courtroom transcripts, to institutional videos. Said relies on Foucault's concept of discursive representation,<sup>6</sup> allowing him to take an extensive textual approach to identifying orientalism in narratives. This is complemented by use of Antonio Gramsci's work, which exposes the relevant texts as operating within the idea and practices of cultural hegemony - as the creation and recreation of unequal power structures through non-physical violence.<sup>7</sup> Using Said's methods is also an opening for post-colonial critique of the construction of victimhood. The foregrounding of structural inequalities as legacies of colonialism, the reification of inequalities of race and racialization, and the structural inequalities of resources, opportunities and wealth across a Global North-Global South divide are critical points of analysis. It should be noted here that this work on stereotypes relies on *recognisability* rather than a strictly empirical methodology. The purpose, then, is to get to the heart of the dominant representation of victimhood which is recognisably reductionist.<sup>8</sup>

The argument builds on recent critical work highlighting and problematizing representational and exclusionary practices of victimhood in international criminal justice.<sup>9</sup> It seeks to add to this debate by including relevant insights from criminology and victimology. Whilst there have been significant efforts to include the insights from criminology in the study of international criminal law,<sup>10</sup> the disciplines mostly continue to be concerned with similar

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<sup>5</sup> E. Said, *Orientalism* (2003, first published 1978) 1.

<sup>6</sup> M. Foucault, *The Archaeology of Knowledge* (A. M. S. Smith (trans.), 2002, first published 1969); M. Foucault, *Discipline and Punish: The Birth of the Prison* (A. Sheridan (trans.) 1991, first published 1975).

<sup>7</sup> A. Gramsci, *Selections from the Prison Notebooks* (Q. Hoare and G. Nowell Smith (eds, trans.) 2007, first published 1971).

<sup>8</sup> Some interesting quantitative analysis may flow from this, say, interviews of victim representatives.

<sup>9</sup> Including Killean and Moffett, 'Victim Legal Representation before the ICC and ECCC' 15 *Journal of International Criminal Justice (JICJ)* (2017) 713-740; Kamari Maxine Clarke, "'We ask for justice, you give us law': the rule of law, economic markets and the reconfiguration of victimhood' in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (2015) 272-301; Laurel E. Fletcher, 'Refracted Justice: The imagined victim and the International Criminal Court' in De Vos, Kendall, Stahn, *ibid* 302-325; Carsten Stahn, 'Justice civilisatrice?' The ICC, post-colonial theory, and faces of "the local", in De Vos, Kendall, Stahn, *ibid* 46-84; Kendall and Nouwen, 'Representational Practices at the ICC: The Gap between Juridified and Abstract Victimhood' in 76(3) *Law and Contemporary Problems* (2014) 235-262.

<sup>10</sup> See eg Roberts and McMillan, 'For Criminology in International Criminal Justice', 1(2) *JICJ* (2003) 315-338; Tallgren, 'The Sense and Sensibility of International Criminal Law', 13 *European Journal of International Law (EJIL)* (2002) 561-595; Hagan, Rymond-Richmond and Parker, 'The Criminology of Genocide: The Death and

issues while operating in separate academic and policy spaces. And yet, there is much international criminal lawyers can learn from criminologists and, when it comes to victims of crime, victimologists. Among criminology's preoccupations are the social phenomena around crime. As the discipline is interested in social constructions of crime, it takes a broad contextual approach. Victimology is a sub-discipline of criminology, which came about through the discontent over the 'forgotten subject' of criminology and its offender-focussed preoccupation.<sup>11</sup> Many victimologists have been inspired by Nils Christie's groundbreaking work. In the context of the study of post-conflict societies and victimhood, Christie's work is beginning to resonate in the interdisciplinary field of transitional justice.<sup>12</sup> Against the background that ICL has been described as a field which is tone deaf to structural and societal phenomena,<sup>13</sup> and neglectful of victim concerns,<sup>14</sup> there may be lessons to be learned from these disciplines.

The final methodological lens, related to insights from postcolonial critique and the disciplines of criminology and victimology, is the emphasis on political economy. I situate the analysis of victimhood construction within a context of competition in the global justice sector. International criminal law, with its paradigm of individual criminal accountability, has become one of the foremost interpretations of the fight for global justice.<sup>15</sup> In the public debate, contemporary humanitarian crises typically give rise to demands on 'who will be brought to justice?'. Identifying a global justice sector is a means to express the marketization of liberal-legal humanitarianism. In bids to secure resources for their vision of global justice, competing interest groups construct narratives around their causes to attract the attention of a small and stretched donor community. I argue that the suffering of victims of international

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Rape of Darfur', 43 *Criminology* (2005) 525-561; A. Smeulers and R. Haverman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (2008). Stephan Parmentier and Elmar Wetekamp, 'Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes in S. Parmentier and E. Weitekamps (eds.), *Crime and Human Rights* (2007) 109-44.

<sup>11</sup> Benjamin Mendelsohn, 'The Origin of the Doctrine of Victimology', 3 *Excerpta Criminologica* (1963) 239-244. On victimology in ICL see: Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in I. Vanfraechem, A. Pemberton and F. Mukwiza Ndahida (eds), *Justice for Victims. Perspectives on Rights, Transition and Reconciliation* (2014) 226-243.

<sup>12</sup> McEvoy and McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' 22(4) *Social & Legal Studies* 489-513.

<sup>13</sup> See eg Krever, 'International Criminal Law: An Ideology Critique', 26(3) *Leiden Journal of International Law (LJIL)* (2013) 701-723.

<sup>14</sup> 'For too long victims have been neglected in international criminal law' begins the abstract of Zappala, 'The Rights of Victims v. The Rights of the Accused', 8 *JICJ* (2010) 137-164.

<sup>15</sup> Sarah Nouwen and Wouter Werner have argued that international criminal law is monopolizing global justice in Nouwen and Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', 13(1) *JICJ* (2015), 157-176.

crime is a prominent theme within that part of the global justice sector which foregrounds individual accountability. A victim who displays certain marketable features is regarded as having the highest value in the global marketplace of victims. This is in line with the work of victimologist Basia Spalek who identifies the ideal victim as being the kind of victim in whose name victim services are typically justified.<sup>16</sup>

### **3. The Victim as a Symbolic and Political Reference Point**

In terms of interests, trends and foci, the international sphere often follows the domestic. Although the discipline of victimology emerged earlier in the mid-twentieth century, the political and policy response to the ‘forgotten subject’ only appeared towards the end of the 20th century, at least in countries of the Global North. Today, victimology is a rich and varied discipline reflecting the fact that policy-making is often driven by victims and victim groups.<sup>17</sup>

Correspondingly, the role of victims has only slowly crystallized in international criminal law. There were no provisions for victim participation at the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the former Yugoslavia (ICTY). These tribunals were rather modelled on the criminal law idea of concentrating criminal concerns between the prosecution and the defendant. In these criminal justice models, justice for victims (from a practical perspective) is generally considered to be a question of private wrongs and therewith a matter for tort law and civil procedure.<sup>18</sup> While in ICTY and ICTR proceedings, victims had the role only as witnesses, victims at the ICC have both the opportunity to participate in proceedings and to claim reparations. This inclusion of victims is reflective of a commitment to both a retributive and restorative approach to international criminal justice. Victim participation is permitted by art. 15(3) Rome Statute of the International Criminal Court (Rome Statute) and art. 19(3) at pre-trial stage and more generally by art. 68(3) Rome Statute. At the ICC, three parties are heard: the prosecution, the defendant’s representatives, and the victims’ representatives. Since the inclusion of victim participation provisions in the Rome Statute, the Special Tribunal for Lebanon and the

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<sup>16</sup> B. Spalek, *Crime Victims: Theory, Policy and Practice* (2006).

<sup>17</sup> Sandra Walklate, ‘Perspectives on the Victim and Victimisation’, in S. Walklate (ed) *Handbook of Victims and Victimology* (2007) 11.

<sup>18</sup> The special Cambodian court, the Extraordinary Chambers in the Courts of Cambodia (ECCC), includes provisions for victims as civil parties in criminal proceedings, similar to French criminal legal proceedings.

Kosovo Specialist Chambers have also included participation mechanisms.<sup>19</sup> To varying degrees, victims may reply to submissions by other participants, they may have disclosure to the case file, they may present their views and concerns to the Court, they can make opening and closing statements, they may present and question evidence, they may interview witnesses, and they may make requests for reparation. That is, their *representatives* can do all these things. The ICC has introduced a significant institutional shift towards centralizing victim concerns in international criminal justice. Attention to victim interests has not only increased juridically at the ICC; since Fatou Bensouda succeeded Luis Moreno-Ocampo as Chief Prosecutor in 2012, victim interests have increasingly been rhetorically mobilized too.<sup>20</sup>

In the space of less than two decades, victims have moved from the margins to the centre of international criminal law concerns. Indeed, the ‘popular presumption today is that to utter the words “victims want justice” is to assume that “victims want adjudication” to address their grievances.’<sup>21</sup> However, the international criminal justice project has also come under pressure. Some denounce it as irrelevant, others as biased.<sup>22</sup> The International Criminal Court (ICC), as the most influential institution of individual criminal accountability, has suffered many a scandal and set-back.<sup>23</sup> This is an institution, and a discipline, fighting for legitimisation. Critics have argued that the label ‘victim’ has increasingly become a generic construction of self-legitimation tied into debates about morality and crime more generally. Sara Kendall and Sarah Nouwen argue that the result of the rhetorical, abstract representation of victims is ‘the creation of a deity-like and seemingly sovereign entity, “The Victim”, which transcends all actual victims and corresponds to no individual victims in their particularity.’<sup>24</sup> This resonates with what leading victimologist Sandra Walklate termed the

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<sup>19</sup> Art. 17 Statute of the Special Tribunal for Lebanon; Chapter 8 Rule of Procedure and Evidence before the Kosovo Specialist Chambers.

<sup>20</sup> Fatou Bensouda, ‘Ceremony for the solemn undertaking of the Prosecutor of the International Criminal Court’, 19 June 2012, available at: <https://www.icc-cpi.int/NR/rdonlyres/561C232F-3C4F-47AC-91CB-8F78DCC6C3FD/0/15062012FBSolemnUndertaking.pdf> (last visited 16 July 2018).

<sup>21</sup> Clarke, ‘We want justice, you give us law’, *supra* note 9, 274.

<sup>22</sup> On bias see, for example, John Dugard, ‘Palestine and the International Criminal Court’ 11(3) *JICJ* (2013) 563-570. It is well known that several African states have expressed concern about an anti-African bias of the ICC. For a discussion, see eg C. C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017).

<sup>23</sup> Most recently, leaked emails and documents revealed a shambolic operation and cronyism when Luis Moreno-Ocampo was chief prosecutor. See, for example, Sven Becker and Dietmar Pieper, ‘The Ocampo Affair: Current ICC Chief Prosecutor Weighed Down by Predecessor’ *Spiegel Online* (17 October 2017), available online at: <http://www.spiegel.de/international/world/international-criminal-court-scandal-widens-a-1173156.html> (last visited 16 July 2018).

<sup>24</sup> Kendall and Nouwen, *supra* note 9, 241.



‘imagined victim’, in whose name the more abstract justifications (such as deterrence or upholding the rule of law) are justified.<sup>25</sup>

Yet, it is not simply an abstract empty meaning of victimhood which has emerged. The abstract and imagined notion of victim has arguably coalesced into an idea of the ‘ideal’ and corresponding ‘non-ideal’ victim of international crime. Whilst at times acknowledging an understanding of complex victim concerns in an internal dialogue, in its *external* work in particular, a notion of an ‘ideal’ victim of international crime has been constructed, which is to be understood as symptomatic of the discipline’s fidelity to market logic.<sup>26</sup>

#### 4. Constructing the ‘Ideal’ Victim

The ‘ideal’ victim is a victimological concept made popular through the work of renowned Norwegian criminologist Nils Christie. It is a concept introducing value hierarchies in the designation of victimhood, whereby some victims are deemed more readily deserving of the status than others. Christie explains that there is a category of individuals ‘*who – when hit by crime – most readily are given the complete and legitimate status of being a victim*’.<sup>27</sup> To identify such a category, one needs to study the use and reification of stereotypes, ‘a widely held but fixed and oversimplified image or idea of a particular type of person or thing’.<sup>28</sup> For Christie, the ideal victim is a little old lady who, on her way home from caring for her sick sister, is hit on the head by a big man who robs her for alcohol or drugs. He identifies five attributes of the ‘ideal’ victim: (1) the victim is weak (female, elderly), (2) the victim was carrying out a respectable project (caring for her sister), (3) she could not be blamed for where she was (she was outside in the daytime), (4) the offender was ‘big and bad’, and (5) the offender was in no personal relationship to her.<sup>29</sup> He also notes that the victim must be able to command just enough power to establish their identity as an ideal victim but ‘*be weak enough not to become a threat to other important interests*’<sup>30</sup>. In his much-cited essay, Christie goes some way to explaining the nature of constructing the ‘ideal’ victim. Making use of the example of European Medieval witch-hunts, Christie demonstrates that ‘little old

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<sup>25</sup> Walklate, *supra* note 17.

<sup>26</sup> The distinction between the internal dialogue and the external litigation and communication processes here is anecdotal, but would make for an interesting empirical project.

<sup>27</sup> Nils Christie, ‘The Ideal Victim’ in E. A. Fattah (ed.) *From Crime Policy to Victim Policy* (1986) 17, at 18 (17-30). Emphasis in original.

<sup>28</sup> ‘Stereotype’, *English Oxford Living Dictionaries*, available online at: <https://en.oxforddictionaries.com/definition/stereotype> (last visited 16 July 2018).

<sup>29</sup> Christie, *supra* note 27, at 19.

<sup>30</sup> *Ibid*, at 21.

ladies' were not always stripped of power and social functions. In today's culture, their status has been reduced to one of lacking agency, obsolete to society. He adds that since society generally feels guilty about the marginalization of little old ladies, the invocation of her victimhood provides a welcome opportunity for directing attention, and action, towards the criminal.

Christie acknowledges that this construction of the 'ideal' victim is culturally specific. One might ask, then: Who is 'the little old lady' of the international sphere? Drawing on Christie's attributes, and adapting them slightly, I identify three attribute categories which make a victim of international crime 'ideal': weakness and vulnerability, dependency, and grotesqueness.

### **A. Victims as Weak and Vulnerable**

According to Christie, the first feature of an 'ideal' victim is that they are weak. The physical attribute of weakness enhances the level of risk posed since the potential victim is less likely to be able to defend themselves when in harm's way. The notion of the level of risk or the greater susceptibility to harm concerns the question of vulnerability. In other words, an 'ideal' victim would not have deliberately put herself at risk; it is the environment which poses the risk of harm, not the victim's involvement.

When it comes to armed conflict, the 'ideal' weak and vulnerable victim tends to refer to women and children. As Ratna Kapur has observed, children and women who find themselves in the midst of an armed conflict are most likely to fit the bill of the ideal, real, deserving, or most authentic victim subject.<sup>31</sup> Hervé Diakiese, one of the victims' representatives in *The Prosecutor v. Lubanga Dyilo* opening hearing, addresses the ICC's Trial Chamber I by stating 'when a ship sinks, the law of rescue is simple: Women and children first... Women and children have been the hostages of warlords in Ituri while the ship of their destiny has been submerged by blood. Women and children first.'<sup>32</sup> The image-making employed here of women and children as surrendered to their bloody destiny, is an extreme imagery of weakness and vulnerability. Turning what is in fact a loose code of conduct rhetorically into a *law* enhances the iconography of the weak and vulnerable victim.

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<sup>31</sup> Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics', 15 *Harvard Human Rights Journal* (2002) 1-38.

<sup>32</sup> *The Prosecutor v. Lubanga Dyilo*, (ICC-01/04-01/06-T-107-ENG ET WT), 26 January 2009, 49.

Indeed, the popular associations with the 1912 sinking of the *RMS Titanic* fortifies the iconography. This is the construction of what Umberto Eco called ‘a stereotyped iconographical unit’.<sup>33</sup> Whether the damsel in distress or the innocent child, these are common figures in visual and textual narratives produced and reproduced by public and private actors alike, from the media to government policies.

As regards women, the literature which aims to reveal and unsettle the potential paternalism and gender essentialism in such social constructions is vast.<sup>34</sup> From the rich literature, it is worth highlighting in particular Kapur’s work on the resurrection of the ‘native’ subject in post-colonial feminist legal politics.<sup>35</sup> Given the focus on Africa for the prosecution of international crimes, particularly at the ICC, and the concomitant racialization of both victims and perpetrators, weakness is both a gendered and a racialized category: ‘That look of starvation, helplessness, and victimization is remarkably familiar to our imaginations’, Kapur observes of the Third World subject, particularly the female subject.<sup>36</sup> Anne Orford warns that interventionism assumes women as lacking agency, where ‘the bodies of “womenandchildren” already appear playing the role of objects: victims of rape, objects of religious control, victims of the sex trade, victims of droughts and famines’.<sup>37</sup> The essentialized notion of gender as recognized predominantly through the criminalization of sexual violence has led critics to point to the patriarchal culture of international criminal justice. The reductionism at play of presenting narratives of violence as sex-based (rather than gender-based) have, according to Chiseche Mibenge, led to the ‘iconic image’ of the brown woman as a raped woman.<sup>38</sup>

The feminized and racialized victim arguably draws on typologies of imperialism which distinguished between binaries of ‘civilized’ and ‘uncivilized’. As a growing literature in international law emphasizes, imperialism was legitimized in international legal terms.<sup>39</sup> John Westlake’s late 19<sup>th</sup> century *Chapters on the Principles of International Law* argues, as a

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<sup>33</sup> Eco *supra* note 1, at 5. Interestingly for the context of war crimes, Eco’s example of a stereotyped iconographical unit is the ‘Evil Nazi’.

<sup>34</sup> See, for example, C. MacKinnon, *Are Women Human?: And Other International Dialogues* (2007).

<sup>35</sup> Kapur, *supra* note 31, 2.

<sup>36</sup> *Ibid.*

<sup>37</sup> A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2009) 66.

<sup>38</sup> C. S. Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (2013).

<sup>39</sup> See the Third World Approaches to International Law (TWAIL) literature and in particular A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007).

provocative example, that regions designated as ‘uncivilized’ ought to be annexed or occupied by ‘advanced’ powers.<sup>40</sup> While the concept of civilized is now in the words of Ntina Tzouvala ‘mostly considered an embarrassing relic of a long-gone era’, the continuations are apparent.<sup>41</sup> Despite formal equality of states under international law, a distinct North-South division persists in terms of those who benefit from international institutions and norms. Although the ICC harboured the promise of genuine egalitarianism and even anti-imperialism, the international criminal justice system has ‘nonetheless predominantly focussed on prosecuting weak or pariah regimes of the global South.’<sup>42</sup> In their *Third World Approaches to International Law* analysis of ICL Reynolds and Xavier uncover the racial biases of some of ICL’s leading protagonists, including David Crane, Prosecutor of the Special Court for Sierra Leone, who claimed that conflicts ‘in these dark corners [of the world] are evolving into uncivilized events’.<sup>43</sup> When it comes to invoking the civilized and uncivilized in ICL, it is after all not so long ago that leading international criminal lawyer Antonio Cassese addressed his distinguished audience, including the Dutch King, by declaring criminal justice as ‘among the most civilized responses to violence.’ In keeping with the essentialism outlined, he lauds criminal justice for channelling ‘the victims’ hatred and yearning for blood revenge into collective institutions that are entrusted with even-handedly appraising the accusations.’<sup>44</sup>

African children are part of the transnational discourse of victimization. The image of the faultless passive child victim has become common with intergovernmental organizations, UN agencies, NGOs and other global civil society actors.<sup>45</sup> Former Chief Prosecutor Luis Moreno-Ocampo’s entire prosecutorial strategy in his first case, *The Prosecutor v Thomas Lubanga Dyilo*, rested on the vulnerability of children. In his opening statement, the prosecutor alleged that the accused had ‘committed some of the most serious crimes of concern to the international community as a whole: crimes against children.’<sup>46</sup> Ocampo

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<sup>40</sup> J. Westlake, *Chapters on the Principles of International Law* (1894)

<sup>41</sup> Ntina Tzouvala, ‘Civilization’ in J. d’Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019 forthcoming, draft on file with the author).

<sup>42</sup> Reynolds and Xavier, ‘“The Dark Corners of the World”: TWAIL and International Criminal Justice’ 14(4) *JICJ* (2016) 959, at 964.

<sup>43</sup> Crane, ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts’, 37(1) *Case Western Reserve Journal of International Law* (2005) 1, at 4.

<sup>44</sup> Cassese, ‘Reflections on International Criminal Justice’, 9(1) *JICJ* (2011) 271-275.

<sup>45</sup> M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012).

<sup>46</sup> *The Case of the Prosecutor v. Thomas Lubanga Dyilo*, (ICC-01/04-01/06), Opening Statement, 26 January 2009, 2.

further subsequently rhetorically immobilized the former child soldiers: ‘They cannot forget the beatings they suffered; they cannot forget the terror they felt; they cannot forget the sounds of their machine guns...’<sup>47</sup> Depicting the victims as entirely innocent necessarily amplifies the guilt of the accused. Certainly, ‘nuance stands at cross-purposes with the prosecutorial imperative to convict.’<sup>48</sup> An example of a legal mechanism designed to keep children ‘innocent’ is the reassignment of responsibility to adults acting as rebel leaders and high ranking commanders through the doctrine of ‘command responsibility’. The ICC’s statute has furthermore altogether precluded jurisdiction over anyone under the age of 18.<sup>49</sup> And yet, although a child’s weakness and vulnerability is presented as an absolute, its tentativeness is revealed in the figure of the ‘child soldier’. Legal technical tools have been employed to distinguish between the child victims and the child perpetrators, whereby the latter category lose any child-like features in the narratives of international criminal justice. Most recently, the contrast between the innocent child and the child soldier has made an appearance in the ICC’s courtroom with the trial of former child soldier Dominic Ongwen.<sup>50</sup>

Criminologist Simon Green states: ‘Age may be a physical characteristic, but how societies understand and respond to different age groups is socially constructed.’<sup>51</sup> The image of children as weak and vulnerable is placed historically by some criminologists in the Victorian era. As Tony Kearon and Barry Godfrey observe, in this period, moral and normative boundaries were sketched out through a growing cultural representation of moral transgression which was mediated through a moral enterprise of the growing print media.<sup>52</sup> ‘Fundamentally,’ Kearon and Godfrey add, ‘this moral enterprise involved the creation of symbolic (and quite literally melodramatic), ideal types of offender and victim whose publicly rehearsed travails reaffirmed normative frameworks in Victorian society’.<sup>53</sup> From this we learn that a victim’s constructed features of weakness and vulnerability are arguably part of a process of ‘othering’ which reaffirms the normative frameworks in the international

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<sup>47</sup> *Ibid.*

<sup>48</sup> Drumbl, ‘The Effects of the *Lubanga* Case on Understanding and Preventing Child Soldiering’ 15 *Yearbook of International Humanitarian Law* (2012) 87, at 101.

<sup>49</sup> Art. 26 Rome Statute.

<sup>50</sup> Mark Drumbl has written powerfully on the blurriness between the lines of victims and perpetrators by considering the rhetorical and legal techniques employed to construct the innocence of children and the monstrosity of the child soldier, in Drumbl, ‘Victims who victimize’ 4(2) *London Review of International Law (LRIL)* (2016) 217-246.

<sup>51</sup> Simon Green, ‘Crime, Victimisation and Vulnerability’ in S. Walklate (ed), *Handbook of Victims and Victimology* (2007) 91, at 97.

<sup>52</sup> Tony Kearon and Barry S. Godfrey, ‘Setting the scene: a question of history’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (2007), 17-36.

<sup>53</sup> *Ibid.*, at 18.

legal sphere. This is echoed by Orford in her observation that: ‘We are shown nameless starving, weeping, mourning strangers as part of a narrative in which we [in the First World] are spiritually enriched by the knowledge of our superiority and capacity to rescue and redeem these others’.<sup>54</sup> Kapur’s case study of womens’ rights movements in the Global South aims to show in how far stereotypes are *inhabited* by the repressed. According to her, the image may be created in the so-called developed world, but it is an image which is also employed and reinforced by the international women’s rights movement in the postcolonial context.<sup>55</sup> The inhabiting of the stereotype reveals something of the perceived necessity to argue within the existing power parameters to achieve recognition.<sup>56</sup> The stereotypes of the ‘native’ subject (particularly of the weak and vulnerable women who are victims of their culture), constructed in the colonial period, are readily available stereotypes which can be effectively engaged by the decolonized subject to suit political ends.<sup>57</sup> In the context of ICL, the existing iconography may explain why victims’ representatives like to rhetorically evoke the stereotype of the ‘ideal’ victim.

### **B. Victims as Dependent**

According to David Miers, the very term ‘victim’ inevitably promotes an image of passivity, where the victim has ‘traditionally been viewed as the “sufferer” in a simple “doer-sufferer” model of criminal interaction’.<sup>58</sup> And yet there is a rich history of political activism and acts of resistance of victim and survivor groups already alluded to above. In international criminal justice, however, various forms of representation tend to preclude both voice and agency. The opening remarks of the Victims’ Representatives in the *The Prosecutor v. Katanga and Ngudjolo* case, the second case which went to trial at the ICC, typifies this:

Your Honour – your Honours, believe me, this is a great moment, a great moment of hope for the victims who, for more than six years, have been waiting, waiting for justice to be served. They have waited

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<sup>54</sup> Orford, *supra* note 37, 32-33.

<sup>55</sup> Kapur, *supra* note 31.

<sup>56</sup> this is reminiscent of Muthucumaraswamy Sornarajah’s ‘lucrative servitude’ argument in which he states that some Asian international lawyers who have achieved ‘success’ within the system would be unwilling to address the ‘unsavoury past of international law’ in Sornarajah, ‘The Asian Perspective to International Law in the Age of Globalization’ 5 *Singapore Journal of International and Comparative Law* (2001), 284, at 291.

<sup>57</sup> In regard to the political end of entrenching a friend/enemy distinction, see Nouwen and Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 21 *EJIL* (2010), 941-965.

<sup>58</sup> D. Miers, *Responses to Victimisation* (1978) 15.

for more than six years so that this Chamber can ensure that international justice will finally allow them to understand.<sup>59</sup>

The statement describes victims as condemned to *wait* without the action of their representatives. The victims of international crimes require the Court to educate them so that they may *understand* their situation. In this construction, the ‘ideal’ victim of international crime is portrayed as a potential beneficiary of international criminal law who requires a subject – the agents of this field – to act for it and in its name.<sup>60</sup> Judges, prosecutors, nongovernmental organizations, and victim representatives not only invoke victimhood, they are presented as the field’s agents. Such agents monopolize the expertise required for speaking for the victim, therefore depriving victims of the agency to speak for themselves. Rather than the courtroom providing victims a forum to be heard, the victim narrative is constructed for them. Particularly the coaching of victims and victim-witnesses, a practice which has frequently been criticized, leaves victims entirely at the hands of those speaking *for* them. While victim representatives in the courtroom concentrate the expression of suffering in a ‘legalese’ alien to most victims, intermediaries play a key role in facilitating legal representation. These intermediaries, who often work for nongovernmental organizations hired by the ICC, tend to be professionals who enjoy much independence and are only subject to piecemeal and reactive scrutiny by the Court.<sup>61</sup> Such professionalization of expertise on matters concerning social justice can be described as a depoliticizing move, where public scrutiny and debate is removed in favour of technocratic matters. Martti Koskenniemi observed a process of depoliticization in regard to the victim of humanitarian intervention; explaining that the victim is ‘worthy of humanitarian support as long as he remains a helpless victim – but turns into a danger the moment he seeks to liberate himself’.<sup>62</sup> We may recall that Christie also observed of the ‘ideal’ victim that they must be able to command just enough power to establish their identity as an ‘ideal’ victim but ‘*be weak enough not to become a threat to other important interests*’<sup>63</sup>.

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<sup>59</sup> *The Prosecutor v. Katanga and Ngudjolo Chui* (ICC-01/04-01/07I), 24 November 2009, 39.

<sup>60</sup> K. Clarke, *Fictions of Justice. The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009).

<sup>61</sup> Haslam and Edmunds, ‘Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections of Proceedings in *Banda and Jerbo*’, 14 *Melbourne Journal of International Law* (2013) 727-747.

<sup>62</sup> Koskenniemi, ‘The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law’ 65(2) *Modern Law Review* (2002) 159, at 173-174.

<sup>63</sup> Christie, *supra* note 27, at 21 (emphasis in original).

The immobilized and depoliticized victim is linked to the related construction (the legal, rhetorical and aesthetic exclusionary practices) of refugees in what has been controversially termed the ‘refugee crisis’. The nature of conflict often leads to mass displacement. As soon as these civilians, the victims of conflict, become mobile and display agency through mobility, they take on additional precariousness.<sup>64</sup> In the context of greater securitization policies and institutions, the intersection between the punitive aspects of criminal law and the protective aspects of refugee law become stark binaries of guilt or innocence. In tune with exclusionary policies and media representations, the simplified binaries of ‘ideal’ victim-perpetrator are similarly applicable to the binaries of ‘ideal’ refugee-criminal. If the refugee does not meet the requirements of an ‘ideal’ refugee they are considered a drain on social security and a source of criminality.<sup>65</sup> The impossibility of this position is poignantly summarized by Lisa Malkki, who notes that the constructed notion of a refugee adds up to ‘an ideal figure of which any actual refugees were always imperfect instantiations’.<sup>66</sup>

### C. *Victims as Grotesque*

Visual and rhetorical representations of victims of international crime display some recurring aesthetical features. For example, the web page of the ICC’s Trust Fund for Victims (TFV), the ICC body in charge of reparations, includes multiple images and video clips of victims of conflict.<sup>67</sup> The vast majority of victims portrayed on the website are black women and children. In addition to the preference for women and children, many of the victims display visual scars of violence – burn marks, mutilations, and other injuries. Female victims are displayed as either bearing scars or carrying small children, often whilst breastfeeding them. Depictions of male victims, far fewer than female victims, are badly maimed or ‘feminized’ through carrying children. Similarly, the ICC’s travelling multimedia exhibition ‘Justice Matters’, which ambitiously claims to portray ‘how justice is crucial to survivors of the

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<sup>64</sup> The expectations of society towards refugees was powerfully critiqued by Hannah Arendt, writing during the Second World War. Arendt refers to the ‘ideal immigrant’ as an immigrant who is patriotic and without a history of belonging, Hannah Arendt, ‘We Refugees’ in M. Robinson (ed.), *Altogether Elsewhere: Writers on Exile* (1943).

<sup>65</sup> See on the construction of the ‘grateful refugee’ Christine Schwöbel-Patel and Deger Ozkaramanli, ‘Aesthetics and the Construction of the “Grateful Refugee”: Perspectives from Law and Design’ in C. Schwöbel-Patel and R. Knox (eds), *The Aesthetics and Counter-Aesthetics of International Justice* (forthcoming 2019); P. Tuitt, *False Images: The Law’s Construction of the Refugee* (1996).

<sup>66</sup> Malkki, ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’, 11(3) *Cultural Anthropology* (1996), 337, at 385.

<sup>67</sup> <https://www.trustfundforvictims.org/en/victims-voices> (last visited 16 July 2018).



world's most heinous crimes',<sup>68</sup> includes several head shots of maimed women. Limbless amputees, raped girls with babies and drug addicted child soldiers are all part of the collective imagination of victims of international crime. One way of describing the aesthetical decisions made in victim representations is through the 'grotesque'. The grotesque is abnormal and therefore unpleasant, but it is also weird and empathy-inducing. The spectacular is conjured through the grotesque. In the words of Kamari Clarke: 'The more spectacular the conjuring of the victim, the more urgent the call to support – morally, fiscally, legally, – the rule of law'.<sup>69</sup> The grotesque is to be found in the exaggeration of certain features, the eyes of the child which appear enlarged because of their thin frame; the bloated tummy; the exposed lactating breasts of the emaciated young mother; the small boy who holds an enormous Kalashnikov.

The former chief Prosecutor of the Special Court for Sierra Leone employed the grotesque to emphasize the urgency of intervention. He narrates an encounter with victims of the Sierra Leonean civil war in the following way:

During the course of the meeting a young woman, holding a child, stood up waiting to ask a question or make a comment. After answering the question at hand I turned to her to allow her to speak. This young Sierra Leonean woman was missing a large part of her face, her burn scars radiated down her shoulder, chest and arms. Blinded by her horrific injuries and through cracked lips she whispered "the rebels have done this to me; do something about what they have done here".<sup>70</sup>

The grotesque is constructed by reference to the deformed young mother, perhaps she was once beautiful. The deformation is unpleasant, but the account of her passive manner -

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<sup>68</sup> [http://www.icc-cpi.int/en\\_menus/icc/educational-resources/justice-matters/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/educational-resources/justice-matters/Pages/default.aspx); the slideshow is available at: <https://www.icc-cpi.int/iccdocs/PIDS/other/JusticeMattersSlideshow-ENG.pdf> (last visited 16 July 2018).

<sup>69</sup> Clarke, 'The Rule of Law Through its Economies of Appearances: The Making of the African Warlord', 18(1) *Indiana Journal of Global Legal Studies* (2011) 11.

<sup>70</sup> David Crane, 'Dancing with the Devil. Prosecuting West Africa's Warlords. Current Lessons Learned and Challenges' in E. Hughes, W. Schabas, R. Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice* (2007) 133, at 133.

waiting to speak, whispering through cracked lips - induces empathy. The fact that she is holding a child intensifies the imagery.

Opening statements in the courtroom, reported on by various media outfits, often have a heightened amount of drama and pathos, where the grotesque is more readily invoked.<sup>71</sup> The Victims' Representative in the case against Kenya's President, *The Prosecutor v Uhuru Muigai Kenyatta* made the following observations:

When a machete lands on a human head, it can take many blows to kill. That became clear to victim 9309 one morning in Naivasha in January 2008. He had tried to escape his house, but Mungiki found him, hacked him repeatedly with a machete and then left him for dead. When I first met him five years after the attack on him, his head bore deep, deep scars, and part of his skull appeared to be hanging on by a miracle. On the evening of the attack, as he laid helplessly in hospital, he telephoned his wife, who told him that after he had been – after he had left, she had been gang-raped by a Mungiki, then doused in paraffin and set alight. Both of them were lucky to escape alive. Both of them want this trial to continue.<sup>72</sup>

Not all international crimes lend themselves as readily to depictions of grotesqueness. Indeed, the cultural property crimes committed in the Mali situation before the Court (the destruction of the religious and historical buildings of Timbuktu), leave victims without notable grotesque bodily features. However, the spectacle of violence is nevertheless described as manifesting. Notably, the victim representative in the Mali situation emphasizes the suffering brought on by shame, 'an indescribable shameful experience that has befallen these people'.<sup>73</sup> The visceral element is represented, as with other violent crimes, through the acts of the perpetrators who, according to the victims representative used 'pickaxes, hoes and bladed weapons' to uncover the mausoleums.<sup>74</sup> The helplessness element described in the opening

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<sup>71</sup> See S. Stolk, 'A Solemn Tale of Horror: The Opening Statement of the Prosecution in International Criminal Trials' (2017), PhD thesis on file at VU Amsterdam.

<sup>72</sup> *The Prosecutor v Uhuru Muigai Kenyatta* (ICC-01/09-02/11) 5 February 2014, 17. Transcript available at: <https://www.legal-tools.org/doc/7e6374/pdf/> (last visited 16 July 2018).

<sup>73</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15) Trial hearing 24 August 2016, Transcript available at: [https://www.icc-cpi.int/Transcripts/CR2016\\_05729.PDF](https://www.icc-cpi.int/Transcripts/CR2016_05729.PDF) (last visited 16 July 2018).

<sup>74</sup> *Ibid*, at 19.

statement of this case mirrors that of bodily integrity crimes. The first quote which the representative chooses is of victim a/35006/16 who described their feeling towards the destruction as: ‘I was overwhelmed, I had vertigo, I was powerless, I was unable to act.’<sup>75</sup> So although these property crimes do not lead to physical deformations of the kind described above, there is a distinct curation of imagery by the victim representative, which bears a striking similarity to empathy-inducing grotesqueness of the ideal victim of ICL.

The increased attention to (grotesque) victims is, according to Walklate and other criminologists, to be understood in the context of a greater societal fascination with gory details.<sup>76</sup> Casualties, displacements, losses, and other grievances are the hallmarks of humanitarian crises. While in other contexts such crises were often sanitized, graphic images are part and parcel of the reporting on crises and the evidence of suffering. Criminologist Claire Valier has described this as a ‘fascination with gothic horror’ in the culture of crime and punishment.<sup>77</sup> Gothicism, typified by gruesome injury, trauma, and shadowy figures, features prominently in the way suffering has been stylized: ‘The powers of horror are an important feature of contemporary populism, and index the place of emotion and fantasy in both institutional practices and political life,’ explains Valier.<sup>78</sup> The monstrosity of the villain is manifested in the grotesqueness of the victim – the deflowering of beauty and potential.

Again, the racialized features of victimhood require highlighting. There is, as Susan Sonntag has observed, a far greater inclination to show human suffering in the more distant and ‘exotic’ places; a practice she calls a ‘colonial reflex’.<sup>79</sup> An ethical understanding of reporting on violence compels the close-up of the Third World subject and a recoiling at the close-up of those in the Global North. In other contexts such voyeuristic consumption of pain has been referred to as the politics of pain, ‘flies in their eyes’, or poverty pornography.<sup>80</sup> The sensationalism with which this rhetoric is presented arguably ties into the neoliberal rationale of ideal victimhood: When resources are scarce, efficiency compels empathy-inducing victims to be recognized first.

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<sup>75</sup> *Al Mahdi* case, *supra* note 73, 20.

<sup>76</sup> Walklate *supra* note 17, 2. Perhaps this is in some parts of the world in fact a *renewed* fascination with gory details. Kearon and Godfrey’s depictions of Victorian crime narratives come to mind, *supra* note 52.

<sup>77</sup> Valier, ‘Punishment, border crossings and the powers of horror’, 6(3) *Theoretical Criminology* (2002), 319-337.

<sup>78</sup> *Ibid.*

<sup>79</sup> S. Sontag, *Regarding the Pain of Others* (2004) 61-64.

<sup>80</sup> On spectacle in international criminal law, see Schwöbel-Patel, ‘Spectacle in International Criminal Law: The Fundraising Image of Victimhood’, 4(2) *LRIL* (2016) 247-274.

The construction and reproduction of a feminized, infantilized, and racialized stereotype of the ‘ideal’ victim is not, it should be said, an indication of the viciousness or nefarious activities of those advocating for international criminal justice. Rather, it is an indication of the streamlined and effective use of those stereotypes.<sup>81</sup> What the advocate of international criminal justice does with the invocation of victimhood as a stereotype is to *confirm* the stereotypes which are already present. Stereotypes build on implicit understandings. In other words, aesthetic representations of victimhood tend to assume a dominant aesthetic which buttresses and supports the status quo. In regard to the question of which lives are grievable, Judith Butler has argued that the privileging of certain images over others ultimately leads to the hierarchization of human life.<sup>82</sup> Butler identifies the precarity which comes with being situated outside of the frame of deserving grievability. For our purposes, precarity does not only mean not being an ‘ideal’ victim and therefore losing victim status, it can also mean being labelled on the opposite pole of the narrative, namely as an offender.

### **5. Ideal Victim - Ideal Perpetrator - Ideal Representative Interdependence**

It is impossible to isolate the construction of the victim from the perpetrator, or, for that matter, the legal representative. The roles co-constitute one-another. The victim cannot appear weak and vulnerable unless the perpetrator is strong and the representative is rational.

As Christie stated, ‘ideal victims need – and create – ideal offenders’.<sup>83</sup> They are interdependent: ‘The more ideal a victim is, the more ideal becomes the offender. The more ideal the offender, the more ideal is the victim.’<sup>84</sup> The ideal offender therefore is the antithesis of the ideal victim – the offender is strong, male, and puts himself at risk; he is independent and politicized, and rather than carrying the empathy-inducing characteristics of the grotesque, the ideal offender is simply ‘ugly’. The depiction of evil – unsettled famously and controversially by Hannah Arendt in *Eichmann in Jerusalem* – has a wider societal role in constructing moral certainties. The perpetrator’s ‘evil’ invites the spectators in the Global North, to correspondingly fortify their own moral position in the ‘international community’ as they side with the victim, and identify with the legal representative.<sup>85</sup>

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<sup>81</sup> Edward Said makes this point of the essentialized use of the Orient, *supra* note 5, at 36.

<sup>82</sup> J. Butler, *Frames of War: When is Life Grievable?* (2009)

<sup>83</sup> Christie, *supra* note 27, at 25.

<sup>84</sup> *Ibid.*

<sup>85</sup> Koskeniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United*

The ideal representative is then the reasonable voice in the emotive turmoil of the victim-perpetrator relationship. The international lawyer speaks reason to chaos, makes reference to the neutrality and superiority of the law, and tempers the emotions through a language of expertise. The legal representative might either be the distantly passionate prosecutorial team or the sombre defence team, or the compassionate victim representatives. This co-construction is, as Said noted, in regard to the construction of the Orient as a European invention, a construction of the self and of the Other. The Orient, according to Said, ‘helped to define Europe (or the West) as its contrasting image, idea, personality, experience.’<sup>86</sup> Empathy, the main emotion which is appealed to, is to be understood in this context of constructing the self and the Other. Empathy as ‘the ability to imagine sympathetically the predicaments of another person’,<sup>87</sup> can politically be a proprietary act which flows from the privileged to the exploited.<sup>88</sup> It need not always be so, but in the context of an audience of spectators from the places considered to be non-violent in the Global North (far be it from the truth), the emotion often manifests itself in distancing and self-affirmation.<sup>89</sup>

## 6. Institutionalizing the ‘Ideal’ Victim of International Crime

The preceding section has provided a flavour of how ‘ideal’ victimhood of international crimes has been constructed and accepted in and around the institutions of ICL, particularly through its imagery and rhetoric. This section seeks to demonstrate how this construction is being produced and reproduced by legal-procedural practices at the ICC. Whilst victim participation continues to be determined on a case by case basis at the ICC, certain practices of streamlining, following the logic of efficiency and consolidation, are underway.

The ICC’s Rules of Procedure and Evidence (RPE) define ‘victims’ widely as any natural persons who have suffered harm as a result of the commission of a crime within the jurisdiction of the Court. Victims may even include organizations or institutions.<sup>90</sup> Regardless of how wide the definition of victims in these rules, the construction of victimhood is determined by Court practices. First, victimhood is necessarily dependent on the charges

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*Nations Law* (2002) 1, at 34, with reference to A. Finkelkraut, *La mémoire vaine. Du crime contre l’humanité* (1988), at 51-52.

<sup>86</sup> Said, *supra* note 5, at 2.

<sup>87</sup> M. Nussbaum, *Not for Profit* (2010) 7.

<sup>88</sup> Empathy as depoliticized is described further below.

<sup>89</sup> R. Meister, *After Evil: A Politics of Human Rights* (2011) 39.

<sup>90</sup> Rule 85 ICC RPE.

brought by the Prosecution. For example, in the *Lubanga* case, there was great disquiet by observers and advocacy groups that the charges were solely framed as regards child soldiers rather than including gender-based, and more specifically sexual violence, charges.<sup>91</sup> Due to this prosecutorial focus, a large amount of *de facto* victims were excluded. Arguably, the focus on innocent children in the first case was a narrative which had wider appeal for the Court's international audience than the issues of sexual violence.

A further narrowing of the definition of victimhood in line with notions of ideal victimhood occurs through the victims' participation process. Collective representations hide individual stories of suffering and instead create generic, often spectacularized, stories. This is done through the organization of victims into groups with common interests and according to geographical location, and the collectivization of applications.<sup>92</sup> As a result of the economies of scale in representing mass violence,<sup>93</sup> widely divergent victims' groups are treated as a single homogenous group with uniform preferences and needs.<sup>94</sup> Generally, this is justified for reasons of efficiency. However, such reasoning can mask the filtering process of non-ideal from ideal victims, as is arguably the case when victims exercise agency in choosing their own legal representative. In May 2016, the ICC's Pre-Trial Chamber denied legal aid to 1,434 victims participating in the case of *Ongwen*.<sup>95</sup> The reason for the denial of their request was that they had chosen a legal representative rather than accept the assigned common representative. The remaining 592 were regarded, in contrast, as entitled to financial assistance because they had *not* chosen a legal representative themselves, accepting therefore the assigned common legal representative chosen by the Court. The judge informed the representatives chosen by two-thirds of victims that they may notify their clients that they could still receive legal aid if they instead chose the ICC's Office of Public Counsel for Victims. Whilst the negating of legal aid does not legally preclude representation, *de facto*, it often does. The refusal was justified, *inter alia*, on the grounds that if victims were to choose

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<sup>91</sup> See, for example, Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, 'Reflection: Gender Issues and Child Soldiers; the case of *Prosecutor v Thomas Lubanga Dyilo*, 25 August 2011, available at: <http://www.iccwomen.org/documents/Gender-Issues-and-Child-Soldiers.pdf> (last visited 16 July 2018).

<sup>92</sup> Decision on Common Legal Representation of Victims, *Ntaganda*, (ICC-01/04-02/06-160), Pre-Trial Chamber II, 2 December 2013; Decision on Common Legal Representation of Victims for the Purpose of Trial, *Bemba*, (ICC-01/05-01/08-1005), Trial Chamber III, 10 November 2010, Organization of the Participation of Victims, *Gbagbo*, ICC-02/11-01/11-29-Red, Pre-Trial Chamber III, 6 February 2012.

<sup>93</sup> Moffett, 'Elaborating Justice for Victims at the International Criminal Court. Beyond Rhetoric and The Hague', 13(2) *JICJ* (2015), 11.

<sup>94</sup> In regard to this more generally in transitional justice, see I. Kovras, *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared* (2017) 5.

<sup>95</sup> *The Prosecutor v. Dominic Ongwen*, Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims, (ICC-02/04-01/15), 26 May 2016.

their own legal representatives this would result in ‘an inevitably unwieldy system’.<sup>96</sup> In fact, the main reason to choose their own representatives was because the victims wished to be represented by someone from their region, or at least someone who spoke Acholi, their language.<sup>97</sup> Similarly, in the Kenyan situation, in the case of *Prosecutor v Ruto and Sang*, an application was made by four victims who opposed representation by the common legal representative; their motion was rejected.<sup>98</sup> Although common legal representation may be practical, ‘it can also appear paternalistic, giving an impression that the courts know who can best represent victims’ interests’.<sup>99</sup> Agency is in this context met with the punitive response of denying legal aid. Indeed, the representation of victims has itself become a highly competitive field, further distancing victims from court proceedings. On the basis of evidence collected through interviews and focus groups with victims, civil society members and Court officials, commentators have observed how the competition between victim representation leaves ‘very little space for victims to exert ownership or participation at the Court.’<sup>100</sup>

The concern that the ICC may fix and institutionalize the stereotype of ideal victimhood could be all the more urgent given the recent attention to victimhood at the Assembly of State Parties to the ICC (ASP). The ASP is the plenary organ of the ICC, responsible for management oversight, including the budget.<sup>101</sup> The ASP has repeatedly called upon state parties ‘to adopt and implement, as appropriate, victim-related provisions’.<sup>102</sup> Such implementation of standards set by the ICC could mean a very real radiating effect of the fixed identities created at the Court to domestic jurisdictions. Meanwhile, the ASP encouraged judges to develop a more consistent practice for victim representation more generally, which spurred the Registry to propose the creation of a Victim Office.<sup>103</sup>

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<sup>96</sup> *The Prosecutor v. Dominic Ongwen*, Decision on Registry’s Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims, ICC-02/04-01/15-591, 14 November 2016.

<sup>97</sup> *The Prosecutor v. Dominic Ongwen*, Decision on contested victims’ application for participation, legal representation of victims and their procedural rights. ICC-02/04-01/15, 27 November 2015.

<sup>98</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the “Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims” ICC-01/09-01/11-330, 9 September 2011.

<sup>99</sup> Killean and Moffett, *supra* note 9, at 726.

<sup>100</sup> *Ibid* at 738.

<sup>101</sup> Art. 112 Rome Statute.

<sup>102</sup> Eg Art. 7 Resolution on ‘Victims and affected communities, reparations and Trust Fund for Victims’, Resolution ICC-ASP/13/Res.4, 17 December 2014.

<sup>103</sup> Consolidating the functions of the Office of Public Counsel for Victims (OPCV), the Registry’s Victims Participation and Reparation Section (VPRS), and some functions carried out by the Counsel Support Section (CSS). Proposed in the Registry ReVision Project and discussed in Killean and Moffett, *supra* note 9, at 720. These proposals have been put on hold.

This streamlining, in combination with the emergent preference for methods of collective representation, have the potential to shape an institutionalized notion of the ‘ideal’ victim. Crucially, despite its purported focus on victims, the Rome Statute does not allocated funds to victim reparations; rather, the Trust Fund for Victims is largely reliant on donors.<sup>104</sup> Donors, coming mostly from the Global North, are, as we learned in the above, more likely to respond to the fundraising image of ‘ideal’ victimhood. The under-emphasis of victims’ interests in the ICC’s procedure, then, is in stark contrast to the over-emphasis in the ICC’s rhetoric. As Foucault powerfully argued, expert institutions strategically deploy discourses not only as a means to neutrally channel information about social harms to the public, but also to reinforce dominant values that lessen potential opposition to the status quo.<sup>105</sup> It is this external activity of the ICC as strategically deployed discourse which allows us to understand the invocation of victimhood in relation to marketing and the ‘attention economy’.

## 7. The ‘Ideal’ Victim in the ‘Attention Economy’

In the previous sections, we encountered some examples of how ‘ideal’ victim stereotypes not only function on the merely ideational or imaginative, but have material consequences. In his analysis of the construction of the Orient, Said explains that Orientalism is not reflected passively by culture, scholarship, or institutions as mere political subject matter or field; nor is it a diffuse collection of texts; nor is it some nefarious ‘Western’ imperialist plot. ‘It is rather a *distribution* of geopolitical awareness into aesthetic, scholarly, economic, sociological, historical and philological texts’.<sup>106</sup>

The distributive effects of stereotypes operates at a material level within a neoliberal international legal regime which revels in a crisis.<sup>107</sup> Crises are particularly marketable in an economy which views attention as a scarce commodity, necessitating techniques which ‘grab’ the attention. The attention economy ‘rewards the extreme at the expense of the erudite, the controversial over the considered’.<sup>108</sup> The main currencies in this economy are

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<sup>104</sup> On the sources of funding, see Resolution ICC-ASP/1/Res. 6 and Ferstman (REDRESS), ‘The International Criminal Court’s Trust Fund for Victims: Challenges and Opportunities’ 6 *Yearbook of International Humanitarian Law* (2003) 424-434.

<sup>105</sup> Foucault *Discipline and Punish*, *supra* note 6.

<sup>106</sup> Said, *supra* note 5, at 12.

<sup>107</sup> Charlesworth, ‘International Law: A Discipline of Crisis’, 65 (2) *The Modern Law Review* (2002) 377.

<sup>108</sup> Patricia McDonald, ‘The attention economy and the demise of the middle ground’, *The Guardian* (6 July 2016).



catastrophic images and simplified narratives - means in which to capture ‘flickering attention’.<sup>109</sup> The idea behind what Tim Wu has called ‘attention merchants’ is that the capturing of attention is profitable, in other words, capturing attention can cause people to part with money.<sup>110</sup> A typical marketing tool for attracting attention is through the process of branding. Branding thrives in our contemporary attention economy: it assumes that consumers have too many choices and too little time and that therefore a simple message is the most effective. According to one of the most widely referenced books on branding, brands ‘were created to simplify our life by helping us navigate more quickly throughout purchase decisions.’<sup>111</sup>

The pull towards employing stereotypes for marketing purposes is strong. Simplified messages, particularly ones which tug at the heart strings, are effective. In this vein, the use of images is particularly effective. The proliferation of exhibitions, online galleries, documentaries, and online videos, point to a distinct turn to the visual as means to simplify. As the popular trope goes: One image can say more than a 1000 words. As the United Nations online exhibition of ten items relating to the work of the ICTY and ICTR promises, visual archives ‘help to make tangible the complexity of the events that took place’.<sup>112</sup> The choice of certain images over others, particularly stereotypical and spectacular images, adds urgency to the simplified message of acting *now*.

This form of spectacularized attention-grabbing is utilized in ‘celebrity’ forms of global humanitarianism and charity work. Celebrities claim to be raising awareness for causes, using the large platforms they have for philanthropy. Celebrity humanitarians often speak on behalf of victims, either explicitly or implicitly of victims in the Third World. Angelina Jolie is well known as one of the most recognisable advocates of the international criminal justice project.<sup>113</sup> However, such projects have been sharply criticized as what Ilan Kapoor terms ‘celebrity humanitarianism’. Rather than being altruistic projects, they are self-serving projects, which help to promote institutional aggrandizement and the celebrity ‘brand’.<sup>114</sup>

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<sup>109</sup> R. Nixon, *Slow Violence and the Environmentalism of the Poor* (2013), at 6.

<sup>110</sup> Wu, *supra* note 4, at 10.

<sup>111</sup> D. Taylor, *Brand Vision: How to Energize your Team to Drive Business Growth* (2006), at 84.

<sup>112</sup> ‘Online Exhibition: A Glimpse into the Archives’, available online at <http://www.unmict.org/specials/glimpse-into-the-archives/> (last visited 16 July 2018).

<sup>113</sup> International Criminal Court (ICC): Angelina Jolie’s Message: [https://www.youtube.com/watch?v=rD\\_vz\\_Qut30](https://www.youtube.com/watch?v=rD_vz_Qut30), (last visited 16 July 2018), 2 December 2016.

<sup>114</sup> I. Kapoor, *Celebrity Humanitarianism: The Ideology of Global Charity* (2013) 1.

Speaking on behalf of victims ‘reduces the Other into passive bystander, unilaterally representing her/his needs and desires,’ while strengthening the celebrity’s profile.<sup>115</sup> Kapoor argues that the empathy which may be felt by the spectators to the humanitarian spectacle has profoundly depoliticizing effects. Rather than encouraging political action, it causes the removal of public scrutiny and debate.<sup>116</sup>

One of Naomi Klein’s worries about the ubiquity of branding as a marketing practice is that the product becomes but a medium to express the brand’s idea.<sup>117</sup> A parallel can arguably be drawn with victims of international crime: they are objectified to become but a medium to express the idea of global justice. They are a type of billboard, encapsulating associations with humanitarianism and global justice. In this manner, victims of international crime have been made to be productive, professionalized even, in the humanitarian business of attracting donors and legitimacy.<sup>118</sup> At this juncture we might recall the words of the victim-witness from the ICC exhibition who describes her testimony as ‘work done well’.

The ‘attention economy’ is just as much about *attraction* as it is about *distraction*: In its grabbing of the attention towards victims of conflict, there is also a politics of distraction from structural violence at play. Wide-spread poverty, disease, or malnutrition are issues of social justice which do not have the (relatively) immediate responses of an international criminal courtroom. Indeed, critics observed of the establishment of the ICTR and ICTY that these were motivated by an effort to deflect responsibility of those states who had failed to prevent mass violence in the former Yugoslavia and Rwanda.<sup>119</sup> Certainly, the increased attention to some issues renders others invisible. The hyperbolic, attention-grabbing, version of reality portrayed with the vulnerable and weak, dependent and grotesque victim should be seen as precisely that: hyperbolic. And yet, the stereotypes speak to a base emotion of providing minimal attention to something which creates empathy. As Umberto Eco said, ‘Two clichés make us laugh, a hundred clichés move us’.<sup>120</sup> Worryingly, it blinds the individual consumer to other social injustices, which cannot be addressed by invoking a victim for the purposes of prosecution and perhaps reparation. Such superficial emotions,

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<sup>115</sup> *Ibid* 3.

<sup>116</sup> *Ibid*.

<sup>117</sup> N. Klein, *No Logo: 10<sup>th</sup> Anniversary Edition* (2009).

<sup>118</sup> See Christie, ‘Conflicts as Property’, 17 *British Journal of Criminology* (1977), 1-15, who argues that ‘Conflicts become the property of lawyers’.

<sup>119</sup> Krever, *supra* note 13.

<sup>120</sup> Eco, *supra* note 1.

achieved through ‘recruiting’ spectators,<sup>121</sup> thus actively prevents the questioning of unequal social structures.<sup>122</sup>

## 8. Conclusion

The ‘ideal’ victim is, in summary of the above, a stereotype which has become a powerful tool of legitimization for political and economic interests of those competing for global justice resources. The objectives of invoking victimhood both visually and discursively may lie in different interpretations of achieving justice for victims. Seeing justice done for the harm caused may lie in psychological benefits of overcoming trauma; it may lie in material benefits of receiving reparations; it may lie in gaining information to understand responsibility; and it may have broader societal functions of advancing efforts of post-conflict transformation. Speaking on behalf of victims, therefore, has both practical and symbolic benefits. In the above I have argued that the symbolic has been prioritized to meet the demands of a sector in which global justice actors compete for attention. This helps us understand the construction, normalization and reproduction of an ‘ideal’ victim. As agency and voice are restricted, or denied entirely, victims of international crime find themselves on a market place, matching themselves against the notion of an ‘ideal’ victim.

In its practices of representation, whether institutionalized procedurally or aesthetically, the ICC has been shown to fix a particular notion of the ‘ideal’ victim. By employing simplified – seemingly more marketable – messages of good and evil, of victims and perpetrators, of peace and justice, the ICC has been primarily appealing to a Western donor community. It does not seem overstated to say that it has consequently (unwittingly) presented itself as an imperialist and interventionist institution. Meanwhile, the vast majority of victims are non-ideal. The lines between victim, perpetrator and bystander are in reality often blurry; the lines between acting and compulsion are equally complicated.<sup>123</sup>

This provides urgency to the task, which could not be addressed here, of studying alternatives. Victims *have* agency, as many inspiring examples throughout history teach us. Indeed, for a more recent example, one might think of the Black Lives Matter movement. Further research needs to be conducted on how international criminal justice, and particularly

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<sup>121</sup> Butler, *supra* note 82, at xii.

<sup>122</sup> And merely ‘creates the delusion that compassion is its own reward’ Meister, *supra* note 89, 73.

<sup>123</sup> Drumbl 2016, *supra* note 50.

the ICC, can unsettle the stereotype of the feminized, infantilized and racialized victim.<sup>124</sup> Allowing victims to speak for themselves and not reproducing stereotypes may be a good place to begin. As regards the broader societal challenges, the study and emphasis on social movements of victims as active agents may be an entry point into questioning representation more fundamentally. Ultimately, however, as Said notes of an alternative to Orientalism, ‘one would have to rethink the whole complex problem of knowledge and power.’<sup>125</sup>

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<sup>124</sup> The African Union member states to the ICC have, notoriously, challenged the ICC for its alleged neo-colonial practices. What is interesting in this regard is that these states are employing, for better or worse, their agency as sovereign states to withdraw from the Rome Statute, to threaten to do so, and to consider alternative regional solutions. See further Jalloh and Bantekas, *supra* note 22.

<sup>125</sup> Said, *supra* note 5, 24.